TITHES DENTAL & PHOTO SUPPLY SDN. BHD. v. EMPRESA LINEAS MARITIMES ARGENTINAS & ORS.

[F.C. (Lee Hun Hoe Ag. L.P., Ali Ag. C.J. (Malaya) and Raja Azlan Shah F.J.) February 14, 1977]

[Penang — Federal Court Civil Appeal No. 41 of 1976]

Contracts — Bailment — Loss of goods carried by sea and stored in godown — No evidence as to when cases tampered with and goods stolen — Liability of port authority — Onus of proof.

Practice and Procedure — Appeal — Inference from facts — Appellate court in as good a position to evaluate evidence as trial court.

The appellants were consignees of 8 cases of Yashica cameras which were shipped from Hongkong by a vessel belonging to the first respondents, discharged into a lighter belonging to the second respondents and brought to the godown of the Penang Port Commission, the third respondents. It appeared that some of the cases had been tampered with and eight cameras were found missing. The appellants sued the first respondents as carriers, the second respondents as independent contractors and the third respondents as bailees for negligence in failing to take or exercise reasonable care of the goods. All the respondents had adduced evidence to absolve themselves from liability by showing their *modus operandi* in connection with the goods in question. They claimed that they had done all they could to protect the appellant's goods. The learned President of the Sessions Court took the view that the damage to the cases and the theft of the cameras occurred in the godown and he therefore held the third respondents were negligent and liable for the loss. On appeal this decision was reversed by the High Court, the learned judge holding that the learned President was wrong on the evidence to hold that the third respondents had not discharged the onus on them that the loss was not due to their negligence. The appellants appealed.

Held, dismissing the appeal: (1) the evidence in this case showed a state of things under which it was doubtful that the loss was caused by the third respondents' negligence. They had shown that they had taken reasonable and proper care of the goods and therefore had discharged the onus of showing that the loss was not due to their negligence;

(2) in this case the question was the proper inference to be drawn from specific facts and the appellate court was in as good a position to evaluate the evidence as the trial judge and should form its own independent opinion though it will give weight to the opinion of the trial judge.

Cases referred to:-

(1) *Malayan Thread Co. Sdn. Bhd.* v. *Oyama Shipping Line Ltd. & Anor.* [1973] 1 M.L.J. 121.

(2) *Muller & Phipps (N) Sdn. Bhd.* v. *Penang Port Commission* [1974] 2 M.L.J. 39.

(3) *Myers* v. *Director of Public Prosecutions* [1965] A.C. 1001 at p. 1024.

(4) *Wong Thin Yit* v. *Mohamed Ali* [1971] 2 M.L.J. 180.

(5) *Port Swettenham Authority* v. *T.W. Wu & Co. (M) Sdn. Bhd.* [1975] 2 M.L.J. 73 at p. 79.

(6) *Port Swettenham Authority* v. *The Borneo Co. (M) Sdn. Bhd.* [1975] 2 M.L.J. 80.

(7) *Lembaga Pelabohan Swettenham* v. *Syarikat Hiap Bee* [1975] 2 M.L.J. 81.

(8) *Jackson's Malaya Berhad* v. *Penang Port Commission* [1973] 2 M.L.J. 27.

(9) *P. Odernamall & Co.* v. *American President Lines Ltd. and Penang Harbour Board* (No. 1) [1956] M.L.J. 6.

(10) *Federal Flour Mills Ltd.* v. *"Ta Tung" Owners & Ors.* [1971] 2 M.L.J. 201.

(11) *The Ida* (1875) 32 L.T. 541.

(12) *Benmax* v. *Austin Motor Co. Ltd.* [1955] 1 All E.R. 326.

FEDERAL COURT.

G.C. Proctor for the appellants.

N.T. Vello for the 1st respondents.

S. Thillaimuthu for the 2nd respondents.

A. Jayadeva (*Lim Peng Siew* with him) for the 3rd respondents.

In the Court below the following grounds of judgment were delivered on May 15, 1976:

Arulanandom J.: This was an appeal from the decision of the President of the Sessions Court given at Penang on the 8th day of January, 1975. The brief facts of the case are as follows. The plaintiffs are the owners of 8 cases of Yashica cameras with carrying cases shipped at Hong Kong by the vessel "Stephanie" under bill of lading dated February 12, 1972. The 8 cases were marked "TITHES, GEORGE TOWN, PENANG, HYA-60 (1st Lot) C/NOS: 1/8."

The first defendants the owners of the ship acknowledged the goods on board the said vessel in apparent good order and condition for carriage to and delivery at Penang under the contract in the bill of lading. The plaintiffs claimed against the first defendants as carriers for reward for failing to deliver the full consignment of goods under the bill of lading.

In the alternative, the plaintiffs claimed that if the first defendants had delivered the full consignment of goods in good order and condition (which was denied), then, the first defendants delivered the consignment of goods to the second defendants (the owners of the Lighter PC. 1496) on arrival at Penang on February 23, 1972 into the 2nd defendant's lighter PC. 1496 for onward transmission of the goods to the third defendants (the appellants).

The plaintiffs claimed that the second defendants did not safely keep or take proper care of the said goods whilst in the lighter and that the second defendants were guilty of negligence in that the full consignment of goods was not delivered to the third defendants.

In the alternative, if the second defendants did deliver the full consignment of the goods in good order and condition (which was denied), the second defendants delivered the goods to the third defendants.

The third defendants received the full consignment of the goods for safe custody and proper care as bailees for reward until delivery of the goods to the plaintiffs on demand in good order and condition.

The third defendants did not deliver the full consignment of the goods in that (1) in Case No. 3, 12 pieces Electro-35 GS 35 mm. camera were missing; (2) in Case No. 4, 12 pieces Electro-35 GS 35 mm. camera were missing; (3) in Case No. 5, 6 pieces YJ 35 mm. camera were missing, and (4) in Case No. 8, 4 pieces YJ 35 mm. camera were missing.

The plaintiffs claimed that as a result they suffered damages and loss in the sum of $4,566.28. The plaintiffs therefore claimed against the first defendant as carriers, the second defendants as independent contractors and third defendants as bailees for failing

to take or exercise reasonable care of the goods and that they were therefore guilty of negligence as a result of which plaintiffs suffered damage.

The first defendants by their defence pleaded that the goods were shipped in apparent good order and condition as per the bill of lading dated February 12, 1972 for carriage to the Port of Penang and that on February 23, 1972 the consignment of goods was discharged in good order and condition into the second defendants' custody in Lighter PC. 1496 for onward transmission of the goods. They pleaded that their liability ceased for discharge of the goods on delivery to the second defendants.

The second defendants by their defence pleaded that on February 23, 1972 they received the 8 cases of goods into their custody in the Lighter PC. 1496 in apparent good order and condition from the first defendants for onward transmission to the third defendants and on February 26, 1972 the second defendants delivered the said 8 cases into the custody of the third defendants at their godown in good order and condition. They pleaded that they had thereby discharged their duty and they denied any negligence on their part.

The third defendants by their defence pleaded that they had delivered the consignment of goods to the plaintiffs in the same order and condition as when received by the third defendants into their custody. They averred that they were not responsible for the loss in cases Nos. 3, 4, 5 and 8 as the cases were received in apparent good order and condition. They further pleaded that they were not liable for any deficiency of goods in the cases as they were protected by their By-Laws, section 64 of The Penang Port Commission By-Laws, 1957, which reads as follows: —

"64. The tallys given by the Commission for cargo shall be deemed to be based upon the outward appearance only of packages and shall bear the following endorsement 'Received in apparent good order and condition, or as otherwise stated, not accountable for weight, measurement, contents or value and subject to all the clauses governing the relative Bill of Lading.'"

The evidence adduced by the parties at the trial was as follows (page 14 of the record). Foo Vin Lim the delivery clerk of the plaintiffs' company went to the Penang Port Commission to take delivery of the goods on February 29, 1972. After handing the documents to the clerk-in-charge he inspected the 8 cases which were intended for the plaintiffs. These cases were properly packed and looked all right from outside but he found that some of them were very light. He suspected that some cases had been renailed. He said at a glance they looked properly packed but on closer examination some of the cases showed marks of having been prised open. He then called for a survey by the underwriters and the cases were opened in the presence of the surveyor in Godown No. 10. Eight cameras as aforesaid were missing from some of the cases. The cases were cases with metal straps. The surveyor of the underwriters stated that he did the survey on behalf of South British Insurance Company the underwriters. On February 29, 1972 he called at the Penang Port Commission and he was taken to survey the 8 cases. He examined the 8 cases and he found all sides of the 8 cases appeared to be in order. But on close inspection on the bottom side of the cases rails securing the steel bands appeared to have been extracted and renailed. He then asked the consignee's representatives to move the cases to a place where there was a weighing scale. He weighed the cases individually and found 4 cases had been tampered with. In his survey report which was Exhibit P5 he states as follows: —

"Cases Nos. 3, 4, 5 & 8: From a superficial inspection these cases were in apparent good order. However, in inspecting the sides of each case carefully, we noted that the nails securing the bottom planks showed signs of having been extracted and renailed...."

He stated further in the report that

"From our findings, we attribute shortage of contents to theft and this would appear to have occurred after the goods had been discharged from the carrying vessel."

The tally clerk of the ship's agent also gave evidence. He checked the goods when they were taken out of the hold of the ship. He did not see any damage to the 8 cases. If there was any damage he would have noted in the remarks column of the tally sheet. He did not personally handle or carry the cases as the workers handled them. He asked them to turn round each case to see whether the metal straps were intact.

The second defendant also gave evidence that he checked the goods in the hatch of the ship and found no damage to the 8 cases. The 8 cases together with other goods were discharged into the lighter on February 23, 1972. He left the lighter at 7.00 p.m. The lighter was completely covered with tarpaulin when he left and the crew and the *taikong* were aboard the vessel.

The shipping clerk of the second defendants (DW4) also gave evidence and he said he supervised the discharge of cargo from the lighter into the godown on February 22, 1972. If there was any tampering or damage to the cargo something would be written but no notes were made of the 8 cases in the remarks column. He said he was on duty throughout the night on February 23 and 24, 1972, with the goods from 8.00 p.m. to 1.00 a.m. and two others would be on guard from 1.00 a.m. to 8.00 a.m.

The storekeeper of the Penang Port Commission (DW6) gave evidence and he said he signed the survey report (Exhibit P6) together with the consignees and the insurers. He said the cases were examined by all the parties very carefully and turned around, there were no signs of tampering and that all the 8 cases were found to be clean. The survey was carried out as there was some complaint that some of the cases were light. He said he kept the 8 cases in the godown where there were 3 watchmen and 3 clerks. He said the godown had 8 doors with 8 locks and 8 keys. All the doors were locked except one door, the main door. The main door remained opened from 7.30 a.m. to 5.00 p.m. and during that time his assistant and 5 members of the staff were there. During lunch time 3 were left. He said the keys were kept on the wall but he agreed that it was possible for someone to take the keys without his knowledge. The keys were kept with the Security Officer. No one could walk freely into the godown.

The Security Officer of the Penang Port Commission (DW7) also gave evidence. He gave evidence about the security system followed in the Penang Port Commission, namely, the pass system to enter the Penang Port Commission whereby only *bona fide* visitors were allowed through a gate control system, *i.e.*, all vehicles were checked; beat patrol system; godown patrol whereby security personnel were deployed inside the godowns; godown storemen, and C.I.D. plainclothes personnel were deployed on the wharf.

The Traffic Manager, Penang Port Commission (DW8) also gave evidence and he said the survey report (P5) listing out the loss was only made subsequent to the survey report prepared and signed by all the parties concerned and the purpose of the survey report by the surveyor was for the consignees to recover the claim from the insurers. He further went on to say that it would not be possible to check every package that is landed to determine its contents.

The learned President found that the goods were discharged clean and in good order without any damage or loss by the first defendants and that the consignment of the goods was discharged and delivered clean and intact by the second defendants into the custody of the third defendants.

The learned President finally came to the conclusion that the theft or loss of the cameras occurred in the Penang Port Commission godown and that the Penang Port Commission were negligent in that they failed to exercise due care and diligence of the goods entrusted to their custody. The learned President also came to the conclusion that there were several instances of theft in the Penang Port Commission godown and that security measures were inadequate. He also discounted the evidence of the Penang Port Commission Storekeeper (DW6), the Security Officer (DW7) and the Traffic Manager (DW8) on grounds that they were interested witnesses. He therefore dismissed the claim against the first and second defendants and gave judgment against the third defendants against which the third defendants have appealed.

From the evidence given at all stages it would appear that the packages were accepted in apparent good order and condition by all the three defendants and even the outward survey by the Penang Port Commission did not reveal the loss. It was only through the handling by the consignees' agent who also said that outwardly it appeared that the cases were in apparent good order, that he found some of the boxes were light and this having aroused his suspicion he called for the survey. All the other witnesses said in the course of their evidence that when the goods were transferred from the ship to the lighter and from the lighter to the godown they did not personally handle the cases. Labourers and workmen handling these packages of various sizes and descriptions would rarely be in the position of a consignee's agent who only examined his own goods. Therefore the possibility that these goods had been removed before they reached the Penang Port Commission cannot be totally ruled out. The Penang Port Commission are in the position of the end-receivers.

As far as the duty of the Penang Port Commission is concerned one must consider its duties as bailees. *Halsbury's* 3rd Edition, Vol. 2, page 116, sets out the law and says: —

"The bailee is not, apart from special contract, an insurer (d), and therefore, in the absence of negligence on his part he is not liable for the loss or damage to the chattel due to some accident (e), fire (f), the acts of third parties, or the unauthorised acts of his servants acting outside the scope of their employment (g)."

Furthermore, in paragraph 227 it is stated that: —

"When a chattel entrusted to a custodian is lost, injured, or destroyed, the onus of proof is on the custodian to show that the injury did not happen in consequence of his neglect to use such care and diligence as a prudent or careful man would exercise in relation to his own property (r). If he succeeds in showing this, he is not bound to show how or when the loss or damage occurred (s)."

The tally sheet of the third defendants (D17) shows that these 8 cases were received in apparent good order and condition. As the same tally sheet shows other goods received were with remarks "broken", "part cracked", "partly broken" or "renailed" the fact that these packages had no remarks will only lead to the conclusion that they were received in apparent good order and condition. As all the other witnesses for the other defendants also gave the same sort of evidence, that is, they received the goods in apparent good order and condition, it is difficult to ascertain whether this was the same apparent good order and condition that the other defendants received their goods in.

However the third defendants were in the situation where they were end-receivers and therefore the goods were subjected to much closer scrutiny while in their custody and hence some of the packages were found to have been tampered with and some cameras missing.

In this case, even if it is the contention of the plaintiffs that the goods were received in good order and condition, then, the third defendants would only be liable as bailees if the loss or damage to the goods was due to negligence on their part. From the evidence of the Security Officer (DW7) of the arrangements for security at the Penang Port Commission and also of the appellant that the Penang Port Commission deals with a large volume of goods of all types and goods which are handled not only by their workers but also before reception by the workers of lighters, one cannot hold that they were negligent in their duty. The steps they have taken appear adequate. Furthermore, by By-Laws 1957 of the Penang Port Commission, the Commission has made it very clear that the tallys given by the Commission for cargo shall be deemed to be based upon the outward appearance only of packages and they may not be accountable for weight, measurement or value. In *Malayan Thread Co. Sdn. Bhd.* v. *Oyama Shipping Line Ltd. & Anor.*[1] where in a similar case the plaintiffs sued the Port Swettenham Authority for damages for loss and the Port Swettenham Authority denied all liability and relied on rule 91(1) of the Port Swettenham Authority By-laws, 1965, which reads: —

"91(1) The Authority shall not be liable for any loss, destruction or deterioration arising from delay in delivery or detention or misdelivery of goods or from any other cause, unless

such loss, or destruction has been caused solely by the misconduct or negligence of the Authority or its officers or servants,"

it was held that the Port Swettenham Authority as bailees had exercised care and diligence in keeping and preserving the goods entrusted to them and they had discharged the onus of showing that the loss of the goods in question was not due solely to their misconduct or negligence.

In considering the case of the Port Swettenham Authority, Raja Azlan Shah J. (as he then was) said as follows, at page 123: —

"In essence the second defendants are bound to exercise as much care and diligence in keeping and preserving the goods entrusted to them on behalf of the plaintiffs as a custodian for reward would do under similar circumstances. That is all they are required to do. They are not supposed to do the impossible. If the goods are stolen by their servants, in the absence of negligence on their part, they cannot be held liable. In the absence of personal negligence on the part of the employer e.g., negligence in selecting the servant whose act had occasioned the loss, (see *Williams* v. *Curson Syndicate Ltd.*[9]) the latter is not responsible for the fraudulent act of the servant, as the loss of the goods is not referable to the employer's negligence, and as the loss is caused by an act which is not within the scope of the servant's employment. (See *Cheshire* v. *Bailey*[10])."

The plaintiffs also relied on invoices to establish the contents of these packages. In *Muller & Phipps (M) Sdn. Bhd.* v. *Penang Port Commission*[2] it was held that the invoices were not admissible evidence to establish the contents of packages if evidence of packing the goods was not adduced.

In view of this ruling, as evidence of packing was not adduced in this case and as all the defendants were only able to say that when the goods were received they were in apparent good order and condition, it follows that there were four distinct possibilities: (1) that the cases were not packed with the number of cameras as alleged by the plaintiffs; (2) the cases were tampered with while being carried in the ship; (3) the cases were tampered with while in the lighters; (4) the cases were tampered with while in the custody of the appellants. To absolve themselves from liability each one of the defendants adduced evidence of their own "*modus operandi*" to protect goods in their custody from loss or damage. It is therefore difficult if not impossible in the first place to decide which of the four possibilities should be accepted. The appellants being the end-receivers are naturally in a disadvantageous position. Firstly, while the goods are in their custody, there is ample time and opportunity to subject the packages to close scrutiny and thorough examination. Secondly, it is only at this stage that insurers of goods are brought in, who, in order to protect their own interests, and I do not mean it in a derogatory fashion, will subject the packages to very critical examination in order to absolve themselves from liability. In fact, one of the reasons for goods being insured when in transit is because of the difficulties which arise in ascertaining which of the various handlers of the goods is responsible for any loss or damage. If, however, in some cases, it is possible to establish this fact, then, the owners could recover from those responsible. If not, the burden falls on the insurer who has insured against the risk.

It was also argued for the plaintiffs/first respondent that the appellants should have known that the goods were missing. On the evidence as adduced before the lower court there is nothing on which this finding could be made.

In all the circumstances of the case the learned President erred in holding that the appellants had not discharged the onus on them that the loss was not due to their negligence. If on the evidence adduced it is so held the burden on end-receivers would not only be unjustifiably onerous but also unconscionable. On the evidence before the court, the appellant had taken all possible steps they could take to ensure the safety of goods in their godowns which comprise a large number in an equally large establishment.

For the reasons given above the appeal was allowed with costs.

From the above decision the 1st respondent/plaintiffs appealed to the Federal Court. In the Federal Court the following judgment was delivered:

Lee Hun Hoe C.J. (Borneo) & Ag. L.P. (read by Raja Azlan Shah F.J.): This is an appeal against the decision of the learned judge in reversing the decision of the learned President of the Sessions Court.

Plaintiffs/appellants were consignees of 8 cases of Yashica cameras shipped from Hong Kong by "Stephanie", a vessel belonging to 1st defendants/1st respondents pursuant to a bill of lading dated February 12, 1972. The vessel arrived in Penang and on February 23, 1972 the 8 cases were discharged in good order and condition into a lighter, PC. 1496, belonging to 2nd defendants/2nd respondents for onward transmission. In their turn 2nd respondents delivered the 8 cases into the custody of 3rd defendants/3rd respondents at their godown in good order and condition on February 26, 1972. When appellants' delivery clerk, Foo Vin Lim (PW2) went to take delivery of the 8 cases on February 29, 1972 he found a few cases rather light. Although the cases looked properly packed on closer examination a few cases showed marks of having been prised open. He did not take delivery but called for a survey by South British Insurance Co., the underwriters. The survey revealed that the bottom side of the case nails securing the steel bands had been extracted and renailed. The cases were weighed individually. 4 cases were found to have been tampered with and on checking 8 cameras were found missing. The survey report (Exhibit P5) concluded that from their findings "we attribute shortage of the contents to theft and this would appear to have occurred after the goods had been discharged from the carrying vessel."

As a result appellants claimed that they had suffered damages and loss to the extent of $4,566.28. They sued the three respondents against 1st respondents as carriers, 2nd respondents as independent contractors and 3rd respondents as bailees for negligence in failing to take or exercise reasonable care of the goods. The learned President taking the view that the damage to the cases and the theft of the cameras occurred in the godown, therefore, held that the 3rd respondents were negligent and liable for the

loss. All the respondents had adduced evidence to absolve themselves from liability by showing their own *modus operandi* in connection with the goods in their custody. They did all they could to protect appellants' goods. It is difficult to pinpoint exactly at what stage the cases were tampered with and the goods stolen. Each case must be decided according to its particular facts. In this case the 3rd respondents had taken all possible steps to ensure the safety of the goods in their custody. With respect, I agree with the learned judge that the learned President was wrong on the evidence to hold that 3rd respondents had not discharged the onus on them that the loss was not due to their negligence.

The learned President was very much influenced by what the storekeeper said regarding the key to the godown. This witness very frankly stated that it was possible for someone to take the key without his knowledge and for someone to make a duplicate key. These are matters in the realm of speculation. There is no evidence to show that such possibility has occurred. Just because both the security officer and traffic manager said that there had been thefts in the godown and in one instance by one of their own security officers did not necessarily mean that the loss of the cameras occurred in the godown. Neither, did it necessarily mean that the 3rd respondents were negligent in the exercise of their duties relating to the care and custody of the goods entrusted to their custody. They were interested parties in the sense that they worked for 3rd respondents but that did not make them unreliable. They could have said nothing about the thefts in the godown but they chose to be truthful.

No survey was carried out in the vessel or lighter apparently because the relevant tally sheets showed the cases had been discharged into the lighter without any remarks and also the goods were discharged clean from the lighter. The learned judge pointed out that evidence of packing was not adduced and the possibilities that cases were not packed with the required number of cameras and that cases could be tampered with in the ship or the lighter or the godown. Quite rightly, he said it was not possible to decide on the evidence which one of the possibilities could be accepted. In fairness to 3rd respondents the learned judge stated at page 68 that: —

"The appellants being the end-receivers are naturally in a disadvantageous position. Firstly, while the goods are in their custody, there is ample time and opportunity to subject the packages to close scrutiny and thorough examination. Secondly, it is only at this stage that insurers of goods are brought in, who, in order to protect their own interests, and I do not mean it in a derogatory fashion, will subject the packages to very critical examination in order to absolve themselves from liability. In fact, one of the reasons for goods being insured when in transit is because of the difficulties which arise in ascertaining which of the various handlers of the goods is responsible for any loss or damage. If, however, in some cases, it is possible to establish this fact. then, the owners could recover from those responsible. If not, the burden falls on the insurer who has insured against the risk."

He stated that the possibility that these goods had been removed before they reached appellants could not be totally ruled out.

It was submitted that the learned judge erred in law in applying By-Law 64 of the Penang Port Commission By-Laws, 1957 without having regard to section 83 of the Penang Port Commission Ordinance, 1955 and other By-Laws, particularly 68. By-law 64 was particularly referred to because allegations were made regarding remarks recorded in the tally sheets in respect of certain cargo while nothing was recorded in respect of the 8 cases. By-law 64 reads:

"64. The tallys given by the Commission for cargo shall be deemed to be based upon the outward appearance only of packages and shall bear the following endorsement 'Received in apparent good order and condition, or as otherwise stated, not accountable for weight, measurement, contents or value and subject to all the clauses governing the relative Bill of Lading.'"

Under By-law 64, 3rd respondents contended that they were not liable for any deficiency of the goods for the tallys given by them for cargo were deemed to be based upon the outward appearance only of packages and they were not accountable for weight, measurement or value. The question whether By-laws 64 and 68 were *ultra vires* was never raised in the lower courts as it was not pleaded. I do not think we should deal with it.

Objection as to the admissibility of the invoices and packing list was raised but was not dealt with by the learned President. *Muller & Phipps (M) Sdn. Bhd.* v. *Penang Port Commission*[2] was dealt with by the learned judge who accepted the ruling that invoices were not admissible evidence to establish the contents of package if evidence of packing the goods was not adduced. In *Myers* v. *Director of Public Prosecutions*[3] Lord Reid made these observations: —

"It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence. The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found discuss in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far the best evidence available."

This passage was in fact quoted by Ali F.J. in his judgment in *Wong Thin Yit* v. *Mohamed Ali*[4] when dealing with section 32 of the Evidence Ordinance.

In *Port Swettenham Authority* v. *T.W. Wu & Co. (M) Sdn. Bhd.*[5] at page 79, I said that: —

"Pilfering is inescapable in a port. Small packages can easily be spirited out of a shed without anyone the wiser. Cases can be broken and goods extracted from them. The best system cannot ensure that no goods will be pilfered."

In this case to all outward appearance the cases appeared to be all right. All the respondents indicated that they had received the goods in apparent good order and condition. Where and when were the cases broken and goods extracted therefrom cannot easily be ascertained.

In this type of cases it is also most important to stress that the facts of each particular case must be looked into carefully. The facts in the present case can be easily distinguished from the three cases mentioned below. In *T.W. Wu's case*[5] 93 cases of

pharmaceutical goods were kept in the godown but 64 cases were found missing. Some of the goods were found in a local firm. Again, in *Port Swettenham Authority* v. *The Borneo Co. (M) Sdn. Bhd.*[6] 173 cartons of teets and soothers were kept in the godown but 103 cartons disappeared. Further, in *Lembaga Pelabohan Swettenham* v. *Syarikat Hiap Bee*[7] all 8 cases of stainless steel sheets were kept in the godown but were never found. Each crate weighed approximately one ton.

Reference was also made to *Jackson's Malaya Berhad* v. *Penang Port Commission.*[8] There again one carton of merchandise was lost. The loss was conceded by defendant who contended that defendant's liability was limited to $1000 under By-law 79. This contention failed as it was held that By-law 79 was *ultra vires* the powers given by the Penang Port Commission Ordinance, 1955.

By his supplementary submission appellants drew our attention to *P. Odernamall & Co.* v. *American President Lines Ltd. and Penang Harbour Board (No. 1)*[9] (shortage of 121 pieces of textile materials) and *Federal Flour Mills Ltd.* v. *"Ta Tung" Owners & Ors.*[10] (wheat grain contaminated by diesel oil) to support his contention that where the court is unable to determine where the loss happened, that loss being unexplained, then the carriers/shipowners, *i.e.* 1st respondents would be liable. In *Odernamall's case*[9] the agreed bundle of document which included the invoice giving details of the contents and a detailed assortment list giving details of the colours and consignment numbers of different goods packed in different cases had been admitted without objection. In the present case the admissibility of the invoices and packing list was challenged. This point was dealt with by the learned judge when he referred to *Muller's case.*[2] As for the *Federal Flour Mills' case*[10] it is sufficient to say that the facts in that case are different from the facts in the present case. Further, the argument in court was mainly that the learned judge was wrong to interfere with the finding of the learned President. The 1st and 2nd respondents were never called upon to answer anything. The three respondents each in turn received the goods in the same apparent good order and condition. To make any particular respondent liable it is for appellant to establish that the goods which were lost were entrusted to that particular respondent. Otherwise, it would mean that such respondents would be liable for goods which were never received. In view of the objection taken to the admissibility of the invoice and packing list, it was incumbent on appellants to prove that the goods lost were inside the cases at the time they were shipped: *The Ida.*[10]

Here the 8 cases appeared outwardly to be in good order and condition. It was only on closer examination that 4 cases showed marks of having been prised open. There is no reason to doubt that 3rd respondents received the goods in the same good order and condition as the other two respondents. But, from the proved facts the learned President drew the inference that the loss was due to the negligence of 3rd respondents. However, if 3rd respondents had shown that from the proved facts other inference or inferences could equally be drawn, one would have to be cautious. The evidence had shown a state of things under which it is doubtful that the loss was caused by 3rd respondents' negligence. They had said that they had taken reasonable and proper care of the goods. Normally, an appellate court would not lightly differ from the finding of the trial judge on a question of fact, but a distinction in this respect must be drawn between the perception of facts and the evaluation of facts. Where the sole question is the proper inference to be drawn from specific facts an appellate court is in as good a position to evaluate the evidence as the trial judge, and should form its own independent opinion, though it will give weight to the opinion of the trial judge. See *Benmax* v. *Austin Motor Co. Ltd.*[11] This is precisely what happened in the present case where the learned judge differed from the learned President in evaluating the evidence.

For reasons given, I would dismiss this appeal with costs to all three respondents.

Ali Ag. C.J. (Malaya) and **Raja Azlan Shah F.J.** concurred.

Appeal dismissed.

Solicitors: *Jayaraman, Ong & Co.; Chung & Vello; Thillaimuthu & Phock Kin; Lim Huck Aik & Co.*

RE APPLICATION OF TAN BOON LIAT & ORS.
TAN BOON LIAT v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.
PATRICK EUGENE LONG v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.
DONNIE LEE AVILA v. MENTERI HAL EHWAL DALAM NEGERI, MALAYSIA & ORS.

[F.C. (Suffian L.P., Raja Azlan Shah and Wan Suleiman F.JJ.) February 26, 1977]

[Kuala Lumpur — Federal Court Criminal Appeals Nos. 24, 16 and 17 of 1976]

Administrative Law — Habeas Corpus — Detention under Emergency (Public Order and Prevention of Crime) Ordinance, 1969 — Trafficking in drugs as member of international drug distribution syndicate — Whether order for detention within scope and ambit of Ordinance — Meaning of "public order" — Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

Interpretation of Statutes — Whether preamble can be used to restrict meaning of section.

These three appeals from the decisions of the High Court reported in [1976] 2 M.L.J. 83 and [1976] 2 M.L.J. 133 were heard together and raise the question whether a person suspected of being engaged in drug trafficking may lawfully be detained under section 4(1) of the Emergency (Public Order and Prevention of Crime) Ordinance, 1969. The sole question on the appeals was whether the grounds on which the orders for detention were made were outside the scope and ambit of the Ordinance.

Held, dismissing the appeals: the ground on which the orders of detention were made against the appellants, namely trafficking in drugs, was within the scope and ambit of the